SUPREME COURT, U. S.
FILED
FEB 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1151

JOSEPH A. ROSIN, Individually and as Representative of a Class,
Petitioners,

vs.

THE NEW YORK STOCK EXCHANGE, INC.,
Respondent.

JOSEPH A. ROSIN, Individually and as Representative of a Class,
Petitioners,

vs.

THE AMERICAN STOCK EXCHANGE, INC.,
Respondent.

VICTOR H. GOULDING, Individually and as Representative of a Class,
Petitioners,

vs.

THE MIDWEST STOCK EXCHANGE,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Names and addresses of counsel appear at the end of this brief.)

February 21, 1974

The questions raised by the petition for certiorari are plainly insubstantial (Rule 19 of this Court). For example, the supposed possibility of a future conflict between the decision below and the decision of some other Court of Appeals (Pet., p. 18) is wholly insufficient as a ground for present review. And the claimed conflict between the decision below and decisions of this Court on principles of statutory construction (Pet., pp. 21-23) is specious.

The questions for review, which involve such matters as criteria for statutory construction and the place of legislative history in such construction, go to the merits of the decision below. That unanimous decision (Appendix, pp. 1-13) shows clearly that the case was correctly decided.

In addition, the decision below is amply supported by the legislative history of the Securities Exchange Act of 1934, which shows Congressional intent at the times of enactment and of subsequently proposed amendments that funds to pay an exchange's registration fee under Section 31 could properly be obtained from customers of member organizations who benefited from the protection provided by the Securities and Exchange Commission under the Act. The consistent interpretation of the Act by the SEC has been to the same effect.

The enacting Congress understood that "the assessment is being made against all who use the stock exchange" (78 Congressional Record 8598 (1934)). In 1957, 1960 and 1972 Congress considered bills to increase the amount of the fee in full awareness that by exchange rules and with SEC approval the fee was passed on to customers, and without any proposal to change this long-standing practice. SEC

Twenty-Third Annual Report (1957) at p. 13; Senate Report No. 605, 85th Congress, 1st Session, on S.2520, at p. 1 (1957); Broker-Dealer License Fees, Hearing before Subcom. of House Com. on Int. and For. Commerce on H.R. 6249, 86th Cong., 2d Session, at p. 4 (1960) (Companion Senate Bill, S.737); Securities Industry Study of the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, H.R.Rep. No. 92-1519, 92d Cong., 2d Sess., at p. 170 (1972).

In addition, the 1957 Senate Report, in describing the earlier 1934 Senate debates on Section 31, stated that:

> "The general tenor of debate in both Houses favored covering as great a portion as feasible of the cost of administering the Commission, by assessing fees against those who would primarily benefit from the existence of the Commission.
>
> • • •
>
> "The fee assessed against the exchange is in practice passed on to investors." (Sen. Rep. No. 605, *supra*, at p. 4).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

MILBANK, TWEED, HADLEY
& MCCLOY
One Chase Manhattan Plaza
New York, New York 10005

CHADWELL, KAYSER, RUGGLES,
MCGEE & HASTINGS
135 South LaSalle Street
Chicago, Illinois 60603

LORD, DAY & LORD
25 Broadway
New York, New York 10004

WILDMAN, HARROLD, ALLEN
& DIXON
One IBM Plaza
Chicago, Illinois 60611

SCHIFF HARDIN & WAITE
231 South LaSalle Street
Chicago, Illinois 60604

WILLIAM ELDRED JACKSON
RUSSELL E. BROOKS
One Chase Manhattan Plaza
New York, New York 10005

VICTOR P. KAYSER
135 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondent
New York Stock Exchange, Inc.

JOHN J. LOFLIN, JR.
25 Broadway
New York, New York 10004

MAX E. WILDMAN
One IBM Plaza
Chicago, Illinois 60611

Attorneys for Respondent
American Stock Exchange, Inc.

MILTON H. COHEN
MITCHELL S. RIEGER
MARTHA M. JENKINS
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Respondent
Midwest Stock Exchange

February 21, 1974